

MINUTES

MONTANA SENATE 58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on January 24, 2003 at 9:00 A.M., in Room 172 Capitol.

ROLL CALL

Members Present:

Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Cindy Peterson, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: SB 177, 1/20/2003
Executive Action: SB 164; SB 34; SB 99

HEARING ON SB 177

Sponsor: SEN. KEN TOOLE, SD 27, Helena

Proponents: Karl Olson, Director, PRIDE
Gene Fenderson, Progressive Labor Caucus
Bernadette Franks-Ongoy, Self
Betty Whiting, Montana Association of Churches
Chris Christiaens, Montana Chapter
of the National Association of Social Workers
Jan Donaldson, Board Member, PRIDE
Greg Haegele, Interim Director,
Montana Human Rights Network
Linda Gryczan, Montana Women's Lobby
Reverend Bob Holmes, Self
Anne Perkins, Self
Bob Ream, Montana Democratic Party
Steve Hendricks, Self
Andrew Franks-Ongoy, Self

Opponents: Julie Millam, Executive Director,
Montana Family Coalition
Jeanette Zentgraf, Concerned Women for America
Chris Jones, Self
Gilda Clancy, Montana Eagle Forum
Jenny Dodge, Citizens' Network
Dr. William D. Wise, Self
Teim Nash, Coalition for Community Responsibility
Harris Himes, Self

Opening Statement by Sponsor:

SEN. TOOLE opened by stating this is a straight-forward bill that adds sexual orientation to the malicious harassment statute.

SEN. TOOLE explained that during the mid-1980s there was in the Pacific Northwest, particularly in northern Idaho, an increase in hate group activity. Members of "the Order" were arrested in Montana. These are hard-core white supremacist groups which were active in our state, and local groups were beginning to form in response to the presence of these organizations. In Helena, for example, we had a group called the League of Peace Amendment Advocates saying they were going to move their national headquarters to Helena. This group was proposing a U.S. Constitutional Amendment which would define citizenship status along rational lines. Community groups were struggling with how to respond to these types of organizations. Part of the effort to raise community awareness included looking to the Legislature.

As the presence of these organized groups increased, so did the incidence of people being threatened and intimidated. **SEN. TOOLE** is not sure if it was the presence of these groups that caused the increase, or if it was because people started to speak out in opposition to these groups. The malicious harassment law was adopted by the Legislature, as was Martin Luther King Day. Both of these were seen as an important statement of the values we hold as a state and what we think is important. Sexual orientation was not included in the statute because the perception of the problem at that time was essentially race. It did not take long before they realized that gay people are primary targets.

SEN. TOOLE explained that hate crime deserves a specific category in the law because the effect of hate crime is different than other kinds of crime. The effect of hate crime is to intimidate an entire group of people. Clearly, hate crimes have a different effect, a different kind of intent, and a different effect on the community at large. This kind of targeting of individuals is terrorism. The FBI has been gathering statistics on hate crime, and sexual orientation is 14 percent of all hate crimes; almost 1,400 incidents nationwide in 2001. This may be a function of reporting, but there is definitely a trend that is increasing.

Proponents' Testimony:

Karl Olson, Director of PRIDE, an organization which advocates for Montana's gay and lesbian community, submitted written testimony in support of SB 177. **EXHIBIT(jus15a01)**.

Gene Fenderson, representing the Progressive Labor Caucus, views this bill as another piece of a mechanism that our society needs to do away with discrimination. **Mr. Fenderson** gave a brief history of Harry Bridges, a labor union leader in the 1930s in California, and how they tried to have him removed because he was an immigrant whose wife was Japanese. As a union representative for the past 35 years, **Mr. Fenderson** has seen sexual orientation used against employees by employers.

Bernadette Franks-Ongoy, Executive Director of the Montana Advocacy Program, appeared before the Committee on behalf of her son, Andrew, who has become the victim of ongoing harassment and a hate crime. **Ms. Franks-Ongoy** submitted written testimony in support of SB 177, **EXHIBIT(jus15a02)**, as well as a copy of Andrew's statement to the police. **EXHIBIT(jus15a03)**.

(Tape : 1; Side : B)

Betty Whiting, representing the Montana Association of Churches, testified that the churches she represents urge the passage of SB 177. **Ms Whiting** stated we need to confront violent tendencies and find ways to cultivate the practice of peace. Discrimination in government, communities, and churches need to be identified. **Ms. Whiting** favors legal remedies for victims of attacks based on sexual orientation, and favors augmenting Montana's criminal code to more effectively address all crime of malicious harassment. All human beings are created in the likeness of God, and are worthy of respect. **Ms. Whiting** urged rejection of all forms of unloving and all forms of hatred and violence.

Chris Christiaens, representing the Montana Chapter of the National Association of Social Workers, rose in support of adding sexual orientation to the malicious harassment laws currently on the books. There is a proliferation of harassment since 9-11, with students in Great Falls being afraid to leave their dorm rooms and attend classes. **Mr. Christiaens** felt the testimony of Bernadette Franks-Ongoy should be the most compelling reason as to why this law is needed.

Jan Donaldson, a member of the Board of Directors of PRIDE, urged the Committee to add sexual orientation to the categories of crimes covered in Montana Code. **Ms. Donaldson** submitted written testimony in support of SB 177. **EXHIBIT(jus15a04).**

Greg Haegle, Interim Director of the Montana Human Rights Network, submitted written testimony in favor of SB 177. **EXHIBIT(jus15a05).**

Linda Gryczan, representing Montana Women's Lobby, rose in support of SB 177 and encouraged the Committee to include women and people with disabilities into the statutes. At least 14 other states have bias crime laws which include women. A violent act against a woman has a terrorizing impact against all women. This act can determine where women live, work, walk, and what they wear. By including gender bias, the justice system will be better able to deal with a perpetrator's underlying attitudes. This will not mean every rape or assault on a woman will qualify as a bias crime. The criteria used will be the same as the criteria used to identify other crimes; i.e. the language used during the assault, the severity of the attack, lack of any other motive, lack of provocation, and history of other attacks. **Ms. Gryczan** encouraged the Committee to find a way to include women, people with disabilities, and lesbians and gay men in existing statutes.

Reverend Bob Holmes, a semi-retired minister, stated his arguments are meant for those who would oppose this legislation

with psychological fears or religious arguments. **Rev. Holmes** believes the whole concept of homosexuality arose only a century ago and that concept acknowledged some people are born with a sexual orientation. The issue is not whether someone is homosexual or heterosexual, but rather whether someone uses their sexuality in compassionate and appropriate ways or abusive and destructive ways. Failure to pass this legislation will send a message that there are some people it is okay to hate, abuse, injure, or even kill. Rev. Holmes urged the Committee to pass this legislation.

Anne Perkins, who is a scientist in reproductive physiology and neuroscience, and is also currently the chair of psychology at Carroll College, came before the Committee representing herself. **Ms. Perkins** has been working for the past 12 years with the Department of Agriculture to identify superior breeding sheep in order to provide economic gain to farmers and ranchers. During this process, **Ms. Perkins** has documented, published, and researched the bodies of sheep that failed to breed. She has discovered that eight percent of the rams tested are homosexual in orientation. She has evaluated these sheep's brains and has discovered why these sheep failed to become sexually roused by sheep of the opposite sex. They now know that sexual orientation is biologically based.

Bob Ream, representing the Montana Democratic Party, stated that the Montana Democratic Party adopted a resolution at their state convention to include sexual orientation to Montana's Hate Crime Act. **Mr. Ream** submitted written testimony in support of SB 177. **EXHIBIT(jus15a06)**.

Steve Hendricks, urged the Committee to pass SB 177 for the good of all Montanans.

Andrew Franks-Ongoy, whose mother testified earlier about his recent bad experiences, stated his life has not been very pleasant since he has become a victim. **Mr. Franks-Ongoy** feels this will further define an existing law. **Mr. Franks-Ongoy** quoted Mark Twain saying, "The difference between the right word and almost the right word is the difference between lightning and a lightning bug." Therefore, if you almost have the right law, it is not going to be right. Everyone should be included.

Opponents' Testimony:

Julie Millam, Executive Director of the Montana Family Coalition, stands in strong opposition to SB 177. **Ms. Millam** submitted written testimony in opposition to this legislation. **EXHIBIT(jus15a07)**. **Ms. Millam** closed by stating in her

profession, she has been a target. She gets letters from homosexuals, had bricks thrown through her window, and her husband has received unsolicited mail saying bad things about her. **Ms. Millam** does not hate homosexuals, but does not agree with the unhealthy lifestyle. **Ms. Millam** added that people are not sheep and objects to that testimony.

(Tape : 2; Side : A)

Jeanette Zentgraf, representing Concerned Women for America, feels SB 177 will not protect people, but instead will usurp the First Amendment Right to freedom of speech. Twenty years ago in New York state, when they included sexual orientation in the hate crime law, they were presented with a sex education curriculum by the school district. This curriculum presented homosexuality as a normal, healthy alternative, and was simply a different sexual preference. Some teachers refused to teach this curriculum. **Ms. Zentgraf** feels this bill is an organized, planned effort to provide special treatment for a group of people and to quiet other people. **Ms. Zentgraf** feels homosexuality will lead a person to a very lonely life. In addition, she feels PRIDE and other groups are behind the effort to get rid of Reggie White as a sponsor for Campbell Soup when he made public his view that homosexuality was a sin. In addition, Dr. Laura, was fired from her position because she stated homosexuality was unhealthy and wrong. **Ms. Zentgraf** believes there is already equal treatment under the law.

Chris Jones, a citizen from Missoula, stated that the homosexual community is frequently asking the courts and the legislature to treat them equally and that their lifestyle be normalized. **Mr. Jones** feels no special group should be given special protection. Hate crimes and harassment should be treated as crimes.

Gilda Clancy, representing Montana Eagle Forum, stated the hate crime data for 2001 lists 9,730 incidents involving 11,451 separate offenses. Only 14.3 percent of these involved a bias against sexual orientation. Of the 16,000 murders in the U.S. in 2001, only 10 of those were related to hate crimes and one of those ten was based on homosexuality. Five of those murders were because of national origin, four involved racial bias, and one was because of sexual orientation. **Ms. Clancy** feels a crime is a crime, and there are enough laws in the books to prosecute those who break the laws.

Jenny Dodge, representing Citizens' Network, testified that current law provides protection for everyone. **Ms. Dodge** submitted written testimony in opposition to SB 177. **EXHIBIT(jus15a08).** **Ms. Dodge** talked about the book *Love Won Out*,

by John and Anne Paulk, and made copies of the book available to the Committee.

Dr. William D. Wise, a doctor of internal medicine, submitted written testimony, in opposition to SB 177. **EXHIBIT(jus15a09)**.
(Tape : 2; Side : B)

Teim Nash, representing Coalition for Community Responsibility, stated he is an Elvis impersonator and has been intimidated and harassed by women. In addition, he has been approached by gay men and finds it repulsive.

Harris Himes, of Hamilton, Montana, opposes SB 177.

Questions from Committee Members and Responses:

Upon question from **SEN. DAN McGEE**, **Mr. Himes** stated he was an attorney. **SEN. McGEE** then requested **Mr. Himes** to review the statutes on intimidation and malicious intimidation. These current statutes provide for a penalty of ten years or \$50,000 for intimidation, and a maximum penalty of five years or \$5,000 for malicious intimidation. Given the testimony of some of the proponents, **SEN. McGEE** wondered if there was any reason why, under today's state intimidation laws, any person threatening someone else, could not be charged under intimidation.

Mr. Himes stated that was a true statement, and, under these two laws, it would make no difference if that person were a homosexual or heterosexual.

SEN. McGEE then asked if a person who intimidates, maliciously or otherwise, or harasses, maliciously or otherwise, someone with a particular sexual orientation, could he be charged under the intimidation statutes, and whether that person could then be sentenced to a higher level of punishment than under malicious intimidation.

Mr. Himes replied certainly and expounded that ten years and \$50,000 is much greater than five years and \$5,000. As long as the elements of 45-5-203 are met, that would be the case.

SEN. BRENT CROMLEY explained that the Committee received a handout from the Montana Catholic Conference, **EXHIBIT(jus15a10)**, and questioned **Lani Candelora** to explain the memo the Committee received from the Montana Catholic Conference.

Ms. Candelora stated it was not her intention to come and oppose the bill today. The memo was distributed to explain the Montana Catholic Conference is not actively supporting this bill in this

session because of the Vatican Congregation for the Doctrine of Faith titled *Responding to Legislative Proposals on Discrimination Against Homosexuals*.

SEN. CROMLEY then asked **Ms. Candelora** that the memo states support for the bill does not resonate with Catholic teaching. **SEN. CROMLEY** did not understand that statement and asked **Ms. Candelora** to elaborate.

Ms. Candelora elaborated by explaining there is Catholic opinion in the U.S. which conflicts with the controlling documents from the Vatican Council. **Ms. Candelora** submitted a list of the controlling documents relied on by the Catholic Church to conclude that this bill does not resonate with Catholic teaching. **EXHIBIT(jus15a11)**.

CHAIRMAN GRIMES stated to **SEN. TOOLE** that after reviewing hearing transcripts from past sessions, he noticed that under 45-5-221, under the definition of harassment, is included "annoy" or "offend." Given the fact the statute is broad, could this violate some basic free speech issues when a person states their objection to the homosexual lifestyle and, as a result, their statements fall under the purview of this statute.

SEN. TOOLE addressed **CHAIRMAN GRIMES'** concern by stating the whole issue of hate speech and ordinances that attempt to prescribe people's right to say whatever they want is a well-settled decision made by the U.S. Supreme Court in Ray v. City of St. Paul. **SEN. TOOLE** does not believe the statute could be used this way. How these statutes are charged will be at the discretion of the prosecutors, and that was the intent. This will give the prosecutors another tool. **SEN. TOOLE** said he did not believe prosecutors would bring charges for annoying someone.

CHAIRMAN GRIMES stated there were some comments made about changing this statute to apply to anyone and, if the Committee did decide to do this, would **SEN. TOOLE** oppose the change. **CHAIRMAN GRIMES** stated that Senator Grosfield had tried to make this same change to an identical bill last session, and the change was vehemently opposed by the proponents of the bill. This leads **CHAIRMAN GRIMES** to believe that perhaps there is a hidden agenda if the real reason is not to protect all people but, rather, to make sure sexual orientation is defined in the list.

SEN. TOOLE addressed the concern by stating he would resist this change. **SEN. TOOLE** proclaimed there is an agenda and it is to address a serious problem. The history of civil rights is recognition of a societal problem and civil rights litigation and

legislation is to address a societal problem. People are targeted because of their race, sexual orientation, or perceived sexual orientation. Laws are statements of values and define what the norms of our society are and what we care about.

CHAIRMAN GRIMES then asked if it would make sense then to say that any harassment, any intimidation, against anyone, are intolerable. **CHAIRMAN GRIMES** feels if that were the case, we have to add in a laundry list of things people could be harassed about such as height, weight, etc.

SEN. TOOLE believes harassment and intimidation of anybody is covered already. The question is whether hate crime and someone is targeted because of their status and the intent of that targeting is to intimidate a larger section of the population and prevent them from participation in the democratic process. In his mind, being tall is not a social problem to the extent that sexual orientation is.

SEN. GARY PERRY stated sometimes he is guilty of inadvertently annoying people, and he is concerned about whether he will be able to recognize a person's sexual orientation.

SEN. TOOLE does not think **SEN. PERRY** is annoying, but he has talked to people who have been singled out because of their sexual orientation. Testimony today proves that there is at least one family who believes they have been singled out because of perceived sexual orientation. An investigation would have to determine whether sexual orientation was the motivation of the perpetrator. **SEN. TOOLE** believes there are mechanisms to do that.

SEN. PERRY followed up his question by stating if the "N" word was used by a Caucasian to describe an African-American is a racist term. **SEN. TOOLE** agreed. In African-American communities, people refer to each other using the "N" word. **SEN. TOOLE** wondered if that was racist and that is very typical both in music and normal conversation.

SEN. TOOLE responded that the African-American community has been very clear about the use of that term, and common usage to their mind, is an effort to reclaim the slur. In essence to give a message back to society to say you cannot hurt us that way, you cannot offend us that way, so we will use that term. The question of whether the term is racist will have many answers. Members of the African-American society say use of the word among themselves is an effort to reclaim their pride and heritage.

SEN. JEFF MANGAN asked **Ms. Clancy** about her statistics and if she feels 14.3 percent is significant. **Ms. Clancy** agreed it is significant. In addition, **SEN. MANGAN** recounted that ten percent of murders was because of sexual orientation. **Ms. Clancy** corrected **SEN. MANGAN** stating that there were a total 16,000 murders in the U.S. in 2001 and only ten of those murders were hate crimes, and only one of the ten was based on homosexuality.

SEN. MANGAN stated that ten percent of the hate crime murders was because of sexual orientation. **Ms. Clancy** did not follow the question and could not agree or disagree with **SEN. MANGAN**.

Upon question from **SEN. MANGAN**, **Mr. Himes** stated he is not admitted to the State Bar of Montana.

(Tape : 3; Side : A)

Before **SEN. TOOLE** closed, **CHAIRMAN GRIMES** and **SEN. McGEE** expressed to **Andrew Franks-Ongoy** and his family that no one on the Judiciary Committee, in any way, shape, or form, condones the type of activity he has had to endure.

Closing by Sponsor:

SEN. TOOLE closed by addressing minority status. The law says you have protection if you are targeted because of your race. All civil rights laws protect everyone and they do not carve out special categories, with the exception of affirmative action, which is a small piece of this area of law. Our civil rights laws cover a number of characteristics which are a matter of choice, such as political beliefs, religious beliefs, and martial status. Historically, the tradition of civil rights in America has been a recognition that something is wrong in society which results in people being treated unfairly. There are a couple of questions we need to ask: First, are there people in our communities and in our society who are being targeted with treatment that is violent, intimidating, and threatening because they are gay, or perceived to be gay? Clearly, the answer to this is yes, as verified by statistics. Second, do we want to do something about it? **SEN. TOOLE** stated he would not be bringing this bill if he did not think we needed to do something. This bill is a statement of our values and what we think is important. As a practical matter, **SEN. TOOLE** urged the Committee to keep in mind this would put one more tool in the prosecutor's tool box.

EXECUTIVE ACTION ON SB 164

Motion: **SEN. MANGAN** moved SB 164 DO PASS.

Discussion:

SEN. MANGAN obtained the information requested by **SEN. McGEE**.

SEN. MANGAN explained there are two conflicting statutes in state code. Section 41-5-1801 provides for appropriately physically restricting setting for youth. In the Youth Court Act, 41-5-103(37), shelter care is defined as a means of temporary substitute care for youth in physically unrestricting. This is conflict **SEN. MANGAN** is attempting to resolve. Currently, shelter care facilities are licenses under the Department of Health and Human Service, and secure detention facilities are licensed under the Department of Corrections. Federal law requires that youth in need of intervention, or status offenders, cannot be held in a physically restrictive setting. Shelter cares were created for status offenders. Status offenders can be held in a staff-secure facility, but not a physically restrictive state. SB 164 removes the physically restrictive setting. The other option would be to strike appropriately physically restricting and put in a staff-secure setting. Either one would satisfy the federal requirement.

SEN. McGEE stated 41-5-103(37) defines shelter care as "the temporary substitute care of youth in physically unrestricting facilities." A shelter care facility, which is also defined in 41-5-1801, means "a facility used for the shelter care of youth. The term is limited to facilities enumerated in 41-5-347." We are talking about the facility versus the care. **SEN. McGEE** agrees that shelter care means physically unrestricting facilities.

SEN. MANGAN explained that 41-5-345 states, "a youth alleged or found to be a youth in need of intervention may not be placed in a jail, secure detention facility, or correction facility." In **SEN. MANGAN's** opinion, status offenders cannot be placed in a secure facility. We are not in compliance with the federal requirements. There are no shelter care facilities licensed under the Department of Corrections; therefore, they are nonsecure. This will affect absolutely nobody today.

SEN. JERRY O'NEIL inquired as to the meaning of staff-secure.

SEN. MANGAN explained staff secure means staff are available and providing supervision at all times rather than a locked door or bars. **SEN. MANGAN** stated staff secure is used in Montana's statutes, but he is unsure as to whether it is defined in statute.

SEN. MCGEE inquired if "appropriately physically restricting setting for youth," as currently defined, would include staff restricting.

SEN. MANGAN replied it could. The language could be amended to say staff secure, because that particular language is acceptable under the federal regulations.

CHAIRMAN GRIMES understands that **SEN. MANGAN's** proposed alternative is to leave in the language under (2), but instead of saying "physically restricting" say "staff secure."

SEN. MANGAN agreed that amendment would be fine.

CHAIRMAN GRIMES then asked Valencia if that would be acceptable.

Ms. Valencia Lane explained that would fall within the title. The proposed change would be on page 1, line 15, following line 14, reinsert subsection (2), except it would go in as "a shelter care facility may be used to provide a staff-secure setting for youth alleged or adjudicated, etc.

SEN. MCGEE would not be in favor of this amendment. The language referring unrestricted setting was changed in 1995 by HB 40. This language "appropriately physically restricting" could mean guards, locks on the windows, whatever is appropriate. If you take this language out, they will not lock the doors or windows, and then that tells the juveniles they can leave if they want to. "Appropriately physically restricting" is perfectly legitimate language. The language is open-ended and flexible. **SEN. MCGEE** feels there is no logical argument that faculty may not provide an appropriate level of confinement for a youth that may harm himself or others.

CHAIRMAN GRIMES asked **SEN. MANGAN** for an example of a shelter care facility and to address this runaway issue. **CHAIRMAN GRIMES** needs a better picture of what a shelter care facility looks like.

SEN. MANGAN described a shelter care facility in Billings which is attached to the Juvenile Detention Center, but has a separate entrance. It is staffed 24 hours a day, seven days a week. There are two shelter care facilities in Helena. These facilities look like any house in any neighborhood. Unless runaways are charged with an offense where they must be placed in secured detention, if they leave, they leave. A policy decision would have to be made to place youth in need of intervention or status offenders in secure facilities. Currently, that is not the policy in Montana.

SEN. MANGAN defined status offenders as those individuals who are charged with an offense that is only an offense if the individual is under the age of 18, such as alcohol, tobacco, or runaway.

SEN. AUBYN CURTISS questioned if delinquent youth are a threat to those around them, what provisions are made and how is the staff protected.

CHAIRMAN GRIMES explained if that was the case, they can be charged as a delinquent youth and confined accordingly.

Motion: **SEN. O'NEIL** moved subsection (2) be worded to say "a shelter care facility may be used to provide an appropriately secure setting for youth alleged or adjudicated to be a delinquent youth or a youth in need of intervention."

Discussion:

SEN. MANGAN resisted the proposed amendment since that is basically how the statute reads now. The point of the bill is to get away from the physically restricting or secure setting. This deviates from the point of the bill.

SEN. O'NEIL believes it would be proper for the Committee to state they do not want the youth in Montana to be held in an insecure manner.

Vote: The motion **failed 3-6 with SENATORS O'NEIL, CURTISS, and MCGEE voting aye.**

Discussion:

SEN. PERRY stated it is clear to him that there is a conflict in statute and we need to go with one or the other. **SEN. PERRY** supports the bill without amendment.

SEN. O'NEIL feels this bill is in response to federal blackmail and proposed another amendment.

Motion: **SEN. O'NEIL** proposed placing "Shelter care facility may be used to provide a staff secure setting."

Discussion:

In response to **SEN. CROMLEY**, **SEN. MANGAN** stated he would prefer not to amend his bill.

CHAIRMAN GRIMES felt saying "staff secure" would prevent use of home arrest.

SEN. MANGAN believed that keeping in "may" language would address **CHAIRMAN GRIMES'** concern.

SEN. MCGEE agrees there is a conflict, but it is only a conflict in language and the real question is where do you want these children. Is the definition in 45-1-103(37), which talks about physically unrestricting facilities, correct? Do we want runaways to be able to runaway at will, the state put them in shelter care, and they runaway again? **SEN. MCGEE** will not support this amendment.

Vote: **SEN. O'NEIL's** motion to amend **FAILED 3-6** with **SENATORS CROMLEY, O'NEIL, and CURTISS** voting aye.

Discussion:

SEN. MIKE WHEAT called for the question on the bill.

CHAIRMAN GRIMES stated he will call the question at the prerogative of the Chair, but he believes further clarification and discussion are needed. **CHAIRMAN GRIMES** understands what **SEN. MCGEE** wants to do in taking this policy the opposite direction in making shelter care facilities secure and eliminate the conflict in the statute.

(Tape : 3; Side : B)

CHAIRMAN GRIMES is concerned about unintended consequences because **SEN. MANGAN** described shelter care facilities that are unrestricted and that making them all restrictive will probably result in a fiscal impact and have other consequences upon existing facilities.

SEN. MANGAN responded that if we do this, we will set back juvenile services twenty years and put ten shelter care facilities out of business. Also, we will limit the ability to provide safe places for at-risk children.

SEN. WHEAT stated he believes there is a shared philosophy of the Legislature to keep families together. **SEN. WHEAT's** concern is that if kids keep running away, what do we do with them. **SEN. WHEAT** feels part of the intent is to further this policy of keeping families together. At some point, however, something has to be done and the state will have to pay to take care of them.

SEN. WHEAT will support the bill because it supports the policy of the state.

CHAIRMAN GRIMES then stated that while he was on the Drug Task Force, he heard from parents about their difficulties in controlling their children who were addicted to meth and became runaways. These parents were asking the legislature to help them nab their kids under runaway statutes, rather than for a drug offense. **CHAIRMAN GRIMES** asked what the parents of a 16-18 year-old youth could do under a status offense if there were no secure shelter cares. Would they have to go ahead and prosecute for the drug offense?

SEN. MANGAN explained the juvenile justice system is set up differently from the adult system for many reasons. Juvenile court and juvenile probation officers deal with those youth who are charged with misdemeanor and felony offenses. Depending on the judicial district and the policy of the youth court in how they want to proceed, some deal with every status offense. **SEN. MANGAN** receives telephone calls every day from parents asking what they can do about their son/daughter. Usual complaints he hears are runaway, truancy, and youth court cannot do anything. We do not want these kids to be charged with serious crimes but, at the same time, there is no way for the justice system to deal with every status offender. Education for families and parents about what is available, the signs of drug use, etc. Generally, there are signs leading up to these problems, but parents do not recognize these signs. Everybody needs to do a better job, because we do not want to lock up status offenders. We want to protect our children and not criminalize them. **SEN. MANGAN** feels the system works much better today than it did five years ago. There are no easy answers, but **SEN. MANGAN** purported it is his experience the answer is not to lock up runaways. Moving toward a community continuum of services and working cooperatively with education and the justice system, faith-based groups, are the types of things needed to address issues. A shelter care facility may be a short-term answer depending on what the youth may be charged with.

SEN. O'NEIL asked **CHAIRMAN GRIMES** with his position on the Drug and Alcohol Task Force, if he could verify the system works much better today than it did five years ago.

CHAIRMAN GRIMES replied the Task Force did not deal with that particular issue.

SEN. McGEE stated that what **SEN. MANGAN** just said is the best argument he could think of for overturning this bill. In 1995 juvenile justice was the issue, and everyone agreed the system

was broken. There were a number of bills, interim committees, councils, task forces, and commissions. The 1995 Legislature adopted the current language which speaks to "appropriately restrictive" language. **SEN. MCGEE** predicted that wiping out this language now, will put Montana back to operating within a broken system within five years. **SEN. MCGEE** went to a huge meeting on corrections in St. Petersburg, Florida, and learned that in Florida they took delinquent youth on tours of the prison. This created a remarkable turnaround in Florida. **SEN. MCGEE** feels this bill will lead down the permissive road, is the wrong thing to do, and will overturn all the work done in the 1995 session.

SEN. PERRY repeated that this bill is defining further "shelter care facility." It seems to **SEN. PERRY** the appropriate steps to accomplish **SEN. MCGEE's** concerns is not in this bill but in a totally different facility. Furthermore, the testimony has been that of the ten shelter care facilities in Montana, none of them have the capability of restriction.

CHAIRMAN GRIMES asked **SEN. MANGAN** to clarify if there are any shelter care facilities that are restricted which will need to be unrestricted by this change.

SEN. MANGAN responded there are no facilities that will be affected in this way. He added he and **SEN. MCGEE** have discussed juvenile justice issues, and he believes they agree on almost everything. It has been five years since there has been a restrictive shelter care facility. This is a very simple bill and is not going to hurt anybody. We have made a decision not to place status offenders in secure detention.

Vote: The motion **SB 164 DO PASS** carried 6-3 with **SENATORS O'NEIL, MCGEE, and CURTISS** voting nay.

EXECUTIVE ACTION ON SB 34

Motion: **SEN. WHEAT** moved **SB 34 DO PASS**.

Motion: **SEN. WHEAT** moved **Amendment SB003401.av. BE ADOPTED.**
EXHIBIT(jus15a12).

Discussion:

SEN. WHEAT explained that after the last meeting he spoke with Tim Reardon and asked him to prepare amendments which would address concerns he had with the necessity issue. **SEN. WHEAT** wanted to make sure the property owner understood this was a

final order on possession and not a preliminary order. **SEN. WHEAT** feels the amendment has addressed his concern.

In addition, **SEN. WHEAT** explained the amendment requires the department to ask the court for an order to show cause why the property should not be condemned as required in the complaint. Also, the amendment adds that if the landowner does not file an objection to the motion within ten days, the court can order the preliminary condemnation order and place them in possession.

SEN. WHEAT described proposed amendment No. 8 as referring back to the motion and order and says the same thing by reference.

Jim Lewis, staff attorney for the Department of Transportation, affirmed that **SEN. WHEAT** correctly described the intent of the amendment. **Mr. Lewis** worked with **Tim Reardon** and **Ms. Lane** on the amendments, and believes they are consistent with their program and the intent of the bill.

SEN. PERRY questioned the use of "10 days or more than 20 days" on line 11.

Ms. Lane explained as a matter of drafting style, they never use "nor."

Vote: The motion that **Amendment SB003401.avl BE ADOPTED PASSED UNANIMOUSLY.**

Motion/Vote: **SEN. McGEE** moved **SB 34 DO PASS AS AMENDED.** The motion **CARRIED UNANIMOUSLY.**

EXECUTIVE ACTION ON SB 99

Motion: **SEN. PERRY** moved **SB 99 DO PASS.**

Motion: **SEN. McGEE** moved **Amendment SB009902.avl BE ADOPTED.**

CHAIRMAN GRIMES stated he sympathizes with the concept of not using MAPA frivolously but he is not sure this will solve their problem.

(Tape : 4; Side : A)

CHAIRMAN GRIMES was surprised there were not a number of other state agencies present to testify in favor of the bill.

SEN. CROMLEY feels the bill gives too much discretion and authority to the agencies, particularly while there are term limits in place. **SEN. CROMLEY** feels we should use caution.

SEN. McGEE supports the amendments, but stated he shares the concern over MAPA. He believes every agency should go through a strict MAPA process for a rule that has a binding effect. **SEN. McGEE** has a problem because the guideline that was found specifically to be a rule, really were not rules. **SEN. McGEE** feels the court overstepped its bounds. The court could have found that DNRC did not follow MAPA in implementing rules; however, DNRC did not implement rules. Then the court went forward by saying DNRC should adopt its guidelines as rules.

SEN. WHEAT believes **SEN. McGEE** is wrong. The court did not tell DNRC it had to make rules. In **SEN. WHEAT's** opinion, DNRC adopted its guidelines for biodiversity and, since those guidelines contained policies that DNRC relied upon in implementing the management of state lands, the court determined DNRC was using those guidelines as rules. Therefore, DNRC should have gone through the process under MAPA to adopt those as rules. Nowhere in the decision does it say they have to adopt rules. By DNRC relying on those guidelines in their decision making process, it meets the definition of a rule. Therefore, DNRC should have followed MAPA in adopting them. This bill will put the burden on the public to find out what the agencies are doing. **SEN. WHEAT** feels the obligation to let the public know what the rules are must remain with agencies.

SEN. PERRY maintained the burden of proof is on the public when the agency does adopt rules. **SEN. PERRY** stated that Leo Berry, one of the bill's main opponents, admitted this bill, if passed, probably does not deny due process to the public. **SEN. PERRY** feels not passing this bill will open doors in every agency where they have taken action without adopting formal rules. Everything an agency had done could be scrutinized in court.

SEN. MANGAN asked two questions at the committee hearing. First, where were the rest of the agencies if this is not a problem? Second, was this because of the one case? **SEN. MANGAN** does not believe it is good policy to set a statute this large based on one case. Had there been other agencies present to support the bill, he might have thought differently.

SEN. McGEE closed on his motion by saying there is one additional thing the amendment does. It requires the public to go to the agency before seeking a court ruling against the agency. **SEN. McGEE** repeated DNRC did not adopt rules, and then the next thing they know, they are in court. The amended language is worthwhile

because it mandates people that have a problem with the agency go to the agency and ask why they did not adopt rules. Had they gone to DNRC and explained the guidelines have the effect of a rule, then possibly there would not have been a resulting court case.

Vote: The motion **TO ADOPT AMENDMENT SB009902.av1 CARRIED** by roll call vote, with **SENATORS MANGAN, PEASE, WHEAT, and CROMLEY (by proxy)** voting nay.

Motion: SEN. McGEE moved **SB 99 DO PASS AS AMENDED**.

Discussion:

CHAIRMAN GRIMES stated he has some extreme concerns about this bill resulting in another capricious and dilatory avenue for getting into the middle of an agency. He does not feel this bill, while in concept is probably a good idea, has had nearly the amount of input from other agencies it needs, and could have unintended effects.

SEN. WHEAT added if, in fact, this is a problem, and it opens the floodgates to litigation, the Committee should wait and see what has happened by the next legislative session. **SEN. WHEAT** feels passing legislation based on one lawsuit and the fact that one agency is unhappy is a dangerous step. He urged the committee to vote against the bill because it sets bad policy.

CHAIRMAN GRIMES followed up by stating he does not normally consider the circumstances that bring about the drafting of a bill, but in this case, he feels those circumstances are relevant.

SEN. PERRY agreed this was only one case, but pressed on stating he won a case against an agency in the Supreme Court, because the agency shut off its fax machine and would not accept faxes or answer its telephone until the end of the day, and then denied the filing of a brief, when the brief would have otherwise been timely. **SEN. PERRY** feels one instance does not mean the problem should be disregarded.

Vote: The motion **SB 99 DO PASS AS AMENDED FAILED 3-6** by roll call vote.

Motion/Vote: **CHAIRMAN GRIMES** moved **SB 99 BE INDEFINITELY POSTPONED**. The motion **CARRIED 6-3** with **SENATORS CURTISS, PERRY AND McGEE** voting nay.

ADJOURNMENT

Adjournment: 12:00 P.M.

SEN. DUANE GRIMES, Chairman

CINDY PETERSON, Secretary

DG/CP

EXHIBIT (jus15aad)